# Benefit-Sharing in marine areas beyond national jurisdiction

# Benefit-Sharing in marine areas beyond national jurisdiction: where are we at? (Part III)

Posted on **March 13, 2015** by **Elisa Morgera**

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March 2015: Formal negotiations are finally to be launched on a new treaty on marine biodiversity in the deep seas, including negotiations on benefit-sharing from marine genetic resources. In January 2015, the UN Working Group on marine biodiversity succeeded in reaching consensus, recommending that the General Assembly launch intergovernmental negotiations on an international, legally binding instrument, to be concluded in the framework of the UN Convention on the Law of the Sea (UNCLOS). This blog post will discuss the implications of this recent development, highlighting new questions that have emerged in relation to benefit-sharing and the challenges that lie ahead.

***Progress***

As already discussed in previous blog posts (Part I and Part II), the Working Group had met twice in 2014 and engaged in substantive, interactive discussions around the feasibility, scope and parameters of a new international instrument on the so-called “package” of issues related to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ), which comprise “marine genetic resources, including questions on benefit-sharing.” On that basis, the January meeting focused on the next procedural steps, with the vast majority of states and civil society arguing for the launch of a formal negotiating process towards a “third implementing agreement to UNCLOS.” Bolstered by alarming media reports on impending, but still avoidable, mass extinctions in the oceans, NGOs and like-minded states were even hoping to fix precise timelines not only for the start but also for the conclusion of a new negotiating process, suggesting the convening of an intergovernmental conference to finalize the text of the new treaty in 2017 (see ENB Analysis).

While the latter idea did not succeed in gathering consensus, the Working Group agreed that

a “preparatory committee” (PrepCom) should convene over the period 2016-2017 to identify the “elements of a draft text of an international legally binding instrument under UNCLOS.” As a result, the General Assembly will have to decide in 2018 whether or not to convene an intergovernmental conference to finalize the negotiating text, with its decision depending on progress being effectively achieved in the PrepCom.

Nevertheless, convening a PrepCom (rather than prolonging the mandate of the Working Group) should still be seen as a much-awaited shift from a principled intergovernmental debate to intergovernmental text-based negotiations on BBNJ, including on benefit-sharing from marine genetic resources in areas beyond national jurisdiction.

It is also noteworthy that for the first time, intergovernmental consensus has been reached on the legally binding nature of the new instrument to be developed under UNCLOS. Previous consensus text had instead been limited to more general references to “the legal framework” (consensus recommendation by the 2011 Working Group) and “an international instrument under UNCLOS” in the Rio+20 Conference outcome document in 2012.

***More questions on benefit-sharing***

As already discussed in this blog, many questions remain outstanding in determining what kind of benefit-sharing mechanism will be developed in a new legally binding instrument. This is particularly true as more and more states seem to favour a pragmatic approach that will build on different existing international benefit-sharing instruments while fully recognising that existing benefit-sharing models are not adapted to the specific challenges raised by BBNJ. New approaches will thus have to be devised in creating solutions targeting BBNJ (hence the reference to a “*sui generis* regime.”).

In addition to those questions, the January meeting highlighted two further sets of issues that should be clarified in formal negotiations. The first was raised in the last batch of state submissions to the Working Group and included in the Co-Chairs’ non-paper that was proposed as a basis for discussions in the January meeting (neither is available online). The novel issue is: what about benefit-sharing from traditional knowledge on BBNJ? The question has never before been raised in the Working Group, partly because the existence of indigenous peoples or local communities holding traditional knowledge related to marine biodiversity in areas beyond national jurisdiction (most likely in the high seas) is not well-documented. It thus remains to be seen whether a new legal instrument on BBNJ may have to devise an approach to intra-State benefit-sharing, as well as to inter-State benefit-sharing, thereby raising a host of challenges related to the rights of traditional knowledge holders, as seen in the context of the Nagoya Protocol.

A second question that seems to be emerging on the sidelines of the meeting but has not yet been addressed in the Working Group discussions is the linkage between benefit-sharing and the conservation of marine biodiversity. The lack of emphasis on this aspect may well explain why most NGOs have not so far engaged in discussions on marine genetic resources in the Working Group. Under the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing, however, specific provisions emphasize the possible contribution of benefit-sharing, either as an incentive or even as an innovative source of

funding, to enhanced conservation (see for instance Articles 1, 9 and 10). Also, benefit-sharing from the use of marine genetic resources for bio-based innovation purposes may lead to scientific discoveries and new opportunities for scientific cooperation that may contribute to addressing challenges in the conservation of marine biodiversity (as anticipated by Article 8(a) of the Nagoya Protocol). What is more, an international benefit-sharing mechanism is likely to raise several unprecedented legal and practical questions at the level of national implementation, and this may justify the creation of new international obligations on capacity building with possible spill-over effects in terms of skills, knowledge and resources to conserve the marine environment (similarly to Article 22(4)(h) of the Nagoya Protocol).

Certainly, if governments are serious about shifting into formal negotiations on marine biodiversity, they will need to develop their positions on benefit-sharing from marine genetic resources in the deep seas substantially and show a significant degree of creativity in forging proposals that will clarify what a *sui generis* benefit-sharing mechanism for marine genetic resources (and traditional knowledge) in the deep seas may look like.

***Challenges ahead***

The outcome of the most recent meeting of the Working Group has been welcomed with renewed hope in the international community. It may also be taken as a hopeful sign that some of the countries that initially opposed a new international agreement on marine biodiversity, such as Iceland, have now conceded that a legally binding agreement is needed to address the gap in the international legal framework concerning benefit-sharing (see ENB Analysis). But it remains to be seen whether the new phase of the negotiations under the UN General Assembly will be able to proceed on the other elements of the package "together and as a whole" – which is a precondition for keeping together the vast majority of developed and developing countries that are supporting a new implementing agreement under UNCLOS. In other words, there is a risk that even if the Working Group has formally completed its mandate and the General Assembly will have to establish a new body (the PrepCom), delegations may in practice return to debates dating back to 2008 on the existence of regulatory or implementation gaps in the current international landscape, with the latter not necessarily requiring the development of new international law but rather better use of existing agreements. In effect, even after consensus had been reached on convening a PrepCom, the January Working Group struggled to agree on the ultimate aim of the proposed negotiations, eventually settling for the need for a "comprehensive" global regime to "better address" conservation and sustainable use of BBNJ.

In addition, in the eyes of those countries that "remain unconvinced" of the need for a new international agreement (at least on all the elements of the package), the "value added" of a new treaty has not been proven unequivocally by the Working Group. NGOs advocated that a new implementing agreement would inject a greener and more modern governance dynamic into the law of the sea, particularly with stakeholders engaging in periodic Conferences of Parties similar to those under other multilateral environmental agreements. They submitted that this could provide the missing global accountability framework for identifying cumulative impacts, good practices, missed opportunities for synergies or weak links across disparate regimes, thereby putting pressure on states lagging behind in

implementation and facilitating much needed coordination. But detractors argued that coordination and accountability with regards to certain elements of the “package” (notably, area-based conservation tools such as marine protected areas and impact assessments) could be more quickly dealt with through non-legally binding General Assembly resolutions. This minority also cautioned that a new, heavier and more intrusive international machinery could backfire and push away key ocean players that would never become parties to a new agreement. Those supporting a new agreement, therefore, will have to prepare a holistic vision of the conservation and sustainable use of marine biodiversity in the deep seas that enshrines benefit-sharing as an inter-linked element of the package that has much to do with marine protected areas and environmental impact assessments. Up to now, these elements have almost invariably been treated in isolation from each other.

Photo courtesy: International Institute for Sustainable Development/Reporting Services (http://www.iisd.ca/oceans/marinebiodiv9/images/23jan/IMG_5848.JPG)

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